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In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

JEAN GLODGETT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The original (App. A, *infra,* pp. 1A–15A) and supplemental (App. B, *infra,* pp. 16A–17A) opinions of the district court are reported at 368 F. Supp. 211 and 218.

JURISDICTION

The judgment of the district court (App. C, *infra,* pp. 18A–19A) was entered on February 20, 1974. The government's notice of appeal to this Court (App. D, *infra,* p. 20A) was filed on April 19, 1974. By orders

entered June 12, 1974, and July 10, 1974, Mr. Justice Marshall extended the time for docketing the appeal to August 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1253, since the decision below was entered by a three-judge court properly convened under 28 U.S.C. 2281 and 2282 to consider this action to restrain the enforcement of 42 U.S.C. 607 (b)(2)(C)(ii) and Vermont Welfare Regulation 2333.1 as unconstitutional. See *King* v. *Smith,* 392 U.S. 309; *Flast* v. *Cohen,* 392 U.S. 83. As this Court recently recognized in *Hagans* v. *Lavine,* No. 72–6476, decided March 25, 1974, slip opt. p. 14, an appeal lies to this Court where a three-judge court was properly convened, even though the court disposed of the case on a nonconstitutional ground.

QUESTION PRESENTED

Whether the district court properly construed 42 U.S.C. 607(b)(2)(C)(ii), and Vermont Welfare Regulation 2333.1, which bar families from receiving benefits under the federally assisted Aid to Families with Dependent Children ("AFDC") program if the father receives unemployment compensation, as granting the father the option to decline unemployment compensation for which he is eligible in order for his family to obtain larger AFDC benefits.

STATUTE AND REGULATION INVOLVED

Section 407(b)(2)(C) of the Social Security Act, as amended, 42 U.S.C. 607(b)(2)(C), requires that, to be eligible for federal financial assistance, state AFDC programs must provide:

for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

* * * * *

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

Vermont Welfare Regulation 2333.1 provides in part (emphasis in original):

An "unemployed father" is one whose minor children are in need because he is out of work, is working part time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that:

* * * * *

3. He is not receiving Unemployment Compensation during the same *week* as assistance is granted.

STATEMENT

This case arises under Title IV of the Social Security Act, 42 U.S.C. 601, *et seq.*, which governs the Aid to Families with Dependent Children ("AFDC") program. The AFDC program is designed to provide public assistance on behalf of dependent children through a system of federal and state funding. In order to receive federal funding, state AFDC plans must comply with certain requirements set forth in Title IV, *et seq.*, as implemented by regulations of the Department of Health, Education, and Welfare, 45 C.F.R. 200, *et seq.*

The AFDC program is directed primarily at children who are dependent because of the "death, continued absence from the home, or physical or mental incapacity of a parent * * *." 42 U.S.C. 606(a). In addition, state AFDC plans may include children who are dependent because of the unemployment of their father. If a state plan includes children of unemployed fathers, Section 407(b)(2)(C)(ii) of the Act, 42 U.S.C. 607(b)(2)(C)(ii), requires that the state plan provide for the denial of AFDC benefits "with respect to any week for which such child's father receives unemployment compensation * * *." The Vermont AFDC plan includes children of unemployed fathers and Vermont Welfare Regulation 2333.1 requires denial of AFDC benefits during any week when such fathers receive unemployment compensation.

This action was brought against the Secretary of HEW and the Commissioner of Vermont's Department of Social Welfare by three families claiming AFDC benefits. Each of the families was denied benefits on the ground that the father was receiving state unemployment compensation. In each instance, the amount of the unemployment compensation was less than the amount of AFDC benefits.[1]

[1] A comparison on a monthly basis of the AFDC benefits denied and unemployment compensation received by the plaintiffs is shown below (App. A, *infra*, pp. 2A–3A):

	AFDC	Unemployment compensation
Glodgett	$239	$60
Derosia	394	56
Percy	410	172

Challenging the denial of AFDC benefits, the plaintiffs sought to have Section 407(b)(2)(C)(ii) and Vermont Welfare Regulation 2333.1 declared invalid and their enforcement enjoined as contrary to the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments (App. A, *infra,* p. 3A). Plaintiffs also sought to represent the class of all Vermont families excluded from AFDC benefits because the father receives unemployment compensation (App. A, *infra,* pp. 4A–5A).

The three-judge district court did not reach the constitutional question because it awarded plaintiffs relief on a statutory ground. Initially, the court held that a three-judge court was appropriate under 28 U.S.C. 2281 and 2282 (App. A, *infra,* p. 4A). Also, although the court's original opinion held that plaintiffs had not proved that their suit met the requisites for a class action (App. A, *infra,* pp. 4A–7A), its supplemental opinion states that the class action designation is largely a formality in that the judgment will bind the State as to all similarly situated persons in the future (App. B, *infra,* p. 16A). Jurisdiction over both state and federal defendants was sustained under 28 U.S.C. 1343(3) (App. A, *infra,* pp. 7A–9A).

On the merits, the court held that Section 407(b)(2)(C)(ii) affords fathers the option of refusing unemployment compensation in order to obtain the higher AFDC benefits. In its view, the language of this AFDC provision indicates "that the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation" (App. A, *infra,* p. 13A).

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The court's judgment incorporates this statutory construction holding as declaratory relief, orders Vermont to advise AFDC applicants of their option to refuse unemployment compensation, and further orders the Secretary of HEW to approve Vermont's program for federal assistance in accordance with the court's construction of Section 407(b)(2)(C) (App. C, *infra*, pp. 18A–19A). The Glodgett, Percy, and Derosia families were awarded retroactive relief, but relief as to all similarly situated Vermont AFDC applicants was stayed pending review by this Court. The judgment grants the named plaintiffs the option of retendering their unemployment compensation plus any amounts received under Vermont's non-federally assisted general assistance program, in order to obtain AFDC benefits (App. C, *infra*, p. 19A). By stipulation, if this option is exercised, the Glodgetts will receive a total of $207.17; the Percys, $342; and the Derosias $21.20 (App. C, *infra*, p. 19A).

From this judgment, both the state (No. 73–1820) and the federal defendants appeal.

THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question in the administration of the AFDC program under the Social Security Act, which warrants plenary review by this Court. Section 407(b)(2)(C)(ii) of that Act, 42 U.S.C. 607(b)(2)(C)(ii), requires denial of AFDC benefits for any week during which a father "receives unemployment compensation" under a state or federal unemployment compensation law. The question is whether this provision permits a father to obtain

AFDC benefits by waiving state unemployment benefits which he is entitled to receive.

As we explain below, the structure of the Act, its legislative history and its settled administrative interpretation show that Congress intended AFDC payments to be made only if state unemployment benefits are not available. If a father qualifies for unemployment benefits, he is disqualified for AFDC payments. Contrary to the holding of the district court, he cannot avoid the statutory prohibition in Section 407(b)(2)(C)(ii) by refusing those benefits and then claiming that, because of his voluntary waiver of them, he is not within the statutory prohibition against making AFDC payments to someone who "receives" unemployment benefits.[2]

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[2] In their complaint in the district court, plaintiffs challenged only the constitutionality of Section 407(b)(2)(C)(ii) and the Vermont regulation, stating that that Section "provides that assistance * * * cannot be granted if the father is eligible for or receiving unemployment compensation." Complaint ¶2. See also, Transcript of March 5, 1973, p. 2. In the memorandum supporting our motion to dismiss this complaint or alternatively for judgment on the pleadings or summary judgment, we stated, "It is the receipt of unemployment benefits and not merely eligibility for such benefits which is the operative factor here; Section 607(b)(2)(C)(ii) turns on receipt of unemployment compensation, not eligibility for such benefits." Memorandum of Law In Support of Motions of Defendant Richardson, filed August 16, 1972, p. 7 n. 2. Subsequently, after the statutory construction issue was raised at oral argument (Transcript of March 5, 1973, pp. 42–44, 55–57), we submitted a supplemental memorandum stating:

"* * * Congress did not want to cut off AFDC solely on the basis of *eligibility* for unemployment compensation, where a delay of weeks between eligibility and actual payment might result from forces beyond the recipient's control, e.g., state inefficiency or red tape. On the other hand, a recipient clearly may

The basic structure of the Social Security Act contemplates that state unemployment compensation programs would be the primary source of income to unemployed fathers, and that the federally-aided AFDC payments would be made only where such state compensation was not available. In other words, one aspect of the standards in the Social Security Act that AFDC benefits would be provided only to the extent that parents "need" them (Section 402(a)(7)) is that AFDC aid is not needed if unemployment compensation is available.

1. a. AFDC was a part of the original Social Security Act of 1935, 49 Stat. 620. In its original form, AFDC was not available to children of unemployed fathers. Congress viewed unemployment compensation as the means by which persons temporarily out of work would be aided until they found new employment. As this Court recognized in *California Human Resources Dept.* v. *Java,* 402 U.S. 121, 131, the unemployment compensation program was intended to

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not take advantage of Congress' concern in this area by purposefully refusing unemployment compensation for which he is eligible, thereby defeating the comprehensive unemployment—AFDC scheme of Congress."

Memorandum of Law, filed March 27, 1973, p. 6. In this memorandum the government thus clarified its earlier position. The district court's statement that the defendants concur in its view that "the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation" (App. A, *infra*, p. 13A) overlooks the clarifying statement in our memorandum of March 27, 1973. In any event, to the extent that our initial statement may be considered inconsistent with our present position, our further study has convinced us that one who refuses available unemployment compensation is barred from AFDC by Section 407(b)(2)(C)(ii).

be the "first line of defense for * * * [a worker] ordinarily steadily employed,"[3] and its purpose was "to enable workers 'to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief'" (quoting H. Rep. No. 615, 74th Cong., 1st Sess. 7).[4]

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[3] Quoting the Hearings before the Senate Committee on Finance, on S. 1130, Report of the Committee on Economic Security, 74th Cong., 1st Sess. 1321.

[4] The pertinent part of this House Report states:

"In normal times [unemployment compensation] will enable most workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief. * * * Unemployed workmen who cannot find other employment within reasonable periods will have to be cared for through work relief or other forms of assistance, but unemployment compensation will greatly reduce the necessity for such assistance. Unemployment compensation is greatly preferable to relief because it is given without any means test."

Like this House Report, the Senate Report also shows that the original design was that resort to AFDC would be made only if unemployment compensation had been exhausted or was unavailable:

"Such unemployment compensation is not a complete safeguard against the hazard of unemployment. In periods of prolonged depression many workmen will exhaust their compensation benefits before they find other employment. This will hold true of some workmen even in periods of prosperity. Supplemental to unemployment compensation there will still be need for work relief for those whose compensation rights have been exhausted, as well as for workers who are outside of the compensation system.

"But unemployment compensation does have real value for many workers. In normal times most workers will secure other employment before exhaustion of their benefit rights. * * * For the great bulk of industrial workers unemployment compensation will mean security during the period following unemployment while they are seeking another job, or are waiting for a return to their old position. In most cases the com-

In 1961, the AFDC program was broadened to cover children of an unemployed parent (father or mother), but Congress continued to view AFDC and unemployment compensation as mutually exclusive programs, with the former available only if the latter was not. Under the 1961 amendments, states participating in the AFDC program were authorized to deny part of or all AFDC benefits "if the unemployed parent * * * receives unemployment compensation." 75 Stat. 76.

In 1968 Congress amended the AFDC statute to require that AFDC be denied if and as long as such child's "father * * * receives unemployment compensation under an unemployment compensation law of a State or of the United States." 81 Stat. 882, 883. Once again, Congress thereby reaffirmed the policy that AFDC be available only as a last resort.

Throughout the development of the federally-assisted AFDC program, Congress endeavored to encourage the states to develop their own programs of financial aid to the unemployed. State participation in AFDC is optional. Congress intended that the financial burdens of AFDC upon the federal government be reduced, wherever other sources of income, including unemployment compensation, were available. The prohibition upon payment of AFDC when unemployment compensation is available furthers two important social objectives. (1) It reduces the burdens of public assistance by providing both a source of in-

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pensation they will receive will be all that they will need. While unemployment compensation will not do away entirely with the necessity for relief, it should very materially reduce the costs of relief in future years."

S. Rep. No. 628, 74th Cong., 1st Sess. 11–12 (1935).

come and a system for maintaining contact between employers and the labor force. (2) It thereby increases the likelihood that the unemployed will obtain work and escape the need for any kind of public assistance.

The legislative history of the 1968 amendment shows that Congress intended that an unemployed father would be required to exhaust unemployment compensation benefits in order to receive AFDC. The Conference Report on the 1968 Act explained:

> * * * Section 407 of the Social Security Act, as amended by section 203(a) of the House bill, defined an unemployed father (for purposes of determining the eligibility of his children for AFDC) so as to exclude fathers who do not have 6 or more quarters of work in any 13-calendar-quarter period ending within one year prior to the application for aid, and fathers who receive (*or are qualified to receive*) any unemployment compensation under State law.
>
> The Senate amendments removed these exclusions, and restored the provision of present law under which a State may at its option wholly or partly deny AFDC for any month where the father receives unemployment compensation during the month. * * *
>
> The Senate recedes * * *. [H. Rep. No. 1030, 90th Cong., 1st Sess. 57 (emphasis added).]

In stating that "fathers who * * * are qualified to receive" unemployment compensation cannot receive AFDC, Congress reiterated its settled philosophy that AFDC was to be given only if unemployment compensation was not available. A father's waiver of such compensation does not make it unavailable.

The same view is reflected in a report of the Senate Committee on Finance, which summarized the major recommendations presented to the Committee on the House version of the 1968 Act.[5] In summarizing testimony against Section 407(b)(2)(C)(ii), the report described this provision as "*not allowing payment if father is eligible for unemployment compensation.*" Brief Summary of Major Recommendations Presented in Oral and Written Statements During Public Hearings before Senate Committee on Finance, on H.R. 12080, 90th Cong., 1st Sess., p. 32 (Committee Print, 1967). Like the Conference Committee, the Senate Committee thus also viewed the provision as barring AFDC payments to persons eligible, *i.e.*, qualified, for unemployment benefits.

b. When Congress amended Section 407(b)(2)(C)(ii) in 1968, it presumably acted with awareness of the Secretary's interpretation of the related provisions of the Act. At that time, as now, Section 402(a)(7) of the Act required that, in determining need of AFDC applicants, a state must consider any other income or resources of applicants. Reflecting the fact that Congress intended AFDC to be a program of last resort, the pertinent regulations provided that states must consider both actual and "potential sources of income that can be developed to a state of availability." HEW's Handbook of Public Assistance Administration, Pt. IV, § 3120 (1964), now 45 C.F.R. 233.20(a)(3)(ix). Moreover, section 3140(4) of the Handbook states that the Act "does not give any individual

[5] The initial House version of Section 407(b)(2)(C)(ii) was identical to the one Congress enacted.

a right to have his needs met out of an assistance program because of his refusal to accept any resource that is available to him upon application." Section 3140(6) of the Handbook specifically includes unemployment compensation as one such resource.[6] Thus, when Congress used the word "receives" in Section 407(b)(2)(C)(ii), it legislated in light of the Secretary's view that AFDC benefits could not be paid to the extent that unemployment compensation was available.

c. In the only other case we know of which considered the question, a three-judge district court upheld our interpretation of the statute. In *Burr* v. *Smith*, 322 F. Supp. 980 (W.D. Wash.), affirmed, 404 U.S.

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[6] These statements were made in the context of requiring an AFDC applicant to apply for reduced old-age benefits at age 62, rather than awaiting eligibility for full benefits at age 65. The relevant portions of the Handbook provide:

"§ 1340(4). * * * Without question, the Act intends that such individuals should have a legal right to decide whether to file for the reduced benefits or wait until they reach sufficient age to receive benefits without reduction, just as any individual has the legal right to decide that he will not apply for any OASDI benefits under any circumstances. The federal act, however, does not give any individual a right to have his needs met out of an assistance program because of his refusal to accept any resource that is available to him upon application.

"§ 3140(6). In addition to OASDI, other statutory benefits to which applicants and recipients for public assistance may qualify, include unemployment insurance, temporary disability insurance, railroad retirement benefits, civil service retirement benefits, other government retirement benefits (Federal, State, county and local), and veterans benefits.

"It is important that the State's policies and procedures for determining eligibility on the basis of need include clear instruction to staff for identifying cases in which such statutory benefits might be a resource, and, with respect to such cases, the process of determining the availability of such resources."

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1027, AFDC applicants challenged the constitutionality of the Washington statute and welfare regulation implementing Section 407(b)(2)(C). The regulation provided: "An otherwise eligible child shall be ineligible for AFDC–E with respect to any week for which his father receives unemployment compensation." 322 F. Supp. at 983. The district court in *Burr* held that "[a] father cannot avoid disqualification simply by failing to register for and receive unemployment compensation." 322 F. Supp. at 984, n. 5. The *Burr* court then concluded that, as thus construed, the exclusion provision was valid.

2. The issue is important in the administration of the AFDC program. Twenty-four states in addition to Vermont participate in the program for unemployed fathers. Since the amount the states pay as unemployment compensation frequently varies from family to family, it is impossible to estimate in what proportion of the cases AFDC payments would exceed state unemployment insurance benefits. The instances of such excess are likely to be substantial, however, and whenever there is such difference, the decision below is likely to lead to the shifting of a portion of the unemployment compensation that the state normally would furnish to the federally funded AFDC.[7] Com-

[7] The AFDC program is funded by appropriations from general federal and state revenues. 42 U.S.C. 620; 33 V.S.A. 2554, 2703. Vermont's general assistance program is also funded by general state revenues. 33 V.S.A. 3003. In contrast, unemployment compensation in Vermont and other states is paid from a separate fund, which consists of funds collected from private employers, 21 V.S.A. 1324–1327, 1358–1359, and money credited to the State's account in the federal Unemployment Trust Fund. 42 U.S.C. 501–504, 1101–1108; *California Human Resources Dept.* v. *Java*, *supra*, 402 U.S. at 126.

missioner Philbrook estimates that for fiscal year 1975, the additional AFDC costs to Vermont under the district court's decree could be $1 million (J.S. in No. 73–1820, p. 21, n. 21). The additional federal share in Vermont would then be approximately $2 million.

As we have shown above, Congress viewed unemployment insurance as the primary source through which unemployed parents would receive financial assistance, and intended AFDC to be available only when unemployment insurance was unavailable. The effect of the decision below would be to permit the federally assisted AFDC program to be used to subsidize unemployed parents for what they consider inadequacies in a state compensation program. That is not what Congress intended when it barred AFDC benefits to persons who "receive" unemployment compensation.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.[8]

Respectfully submitted.

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[8] The district court took jurisdiction of this case solely under 28 U.S.C. 1343(3), which gives district courts jurisdiction over

actions "[t]o redress the deprivation, under color of any State law, * * * of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens * * *." The Social Security Act is not an "Act of Congress providing for equal rights * * *." *Almenares* v. *Wyman*, 453 F. 2d 1075, 1082, n. 9 (C.A. 2), certiorari denied, 405 U.S. 944; cf. *Georgia* v. *Rachel*, 384 U.S. 780, 792; *City of Greenwood* v. *Peacock*, 384 U.S. 808, 825. The Secretary's actions that were challenged in this case as unconstitutional were taken not "under color of any State law," but under federal law. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652; *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 398, n. 1 (Harlan. J. concurring); *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2) (L. Hand, J.), certiorari denied, 339 U.S. 949; *Norton* v. *McShane*, 332 F. 2d 855, 862 (C.A. 5), certiorari denied, 380 U.S. 981; *Williams* v. *Rogers*, 449 F. 2d 513, 517 (C.A. 8), certiorari denied, 405 U.S. 926.

In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 547, this Court stated that "in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction." The district court made no finding that this case involves more than $10,000.

The *Lynch* case seemingly indicates that the district court had no basis for jurisdiction over the Secretary in this case under 28 U.S.C. 1343(3). Other three-judge district courts have held that that Section does not confer jurisdiction over the Secretary in actions challenging the constitutionality of the AFDC statute. *Stinson* v. *Finch*, 317 F. Supp. 581 (N.D. Ga.); *Ramirez* v. *Weinberger*, 363 F. Supp. 105 (N.D. Ill.), affirmed, No. 73-5972 (March 18, 1974).

The district court relied primarily (App. A. *infra*, p. 7A) upon *Aguayo* v. *Richardson*, 473 F. 2d 1090 (C.A. 2). There jurisdiction over federal and state officials in an AFDC action was sustained under Section 1343(3) by extending the doctrine of pendent jurisdiction to parties, as well as claims, not otherwise subject to the court's jurisdiction. In *Moor* v. *County of Alameda*, 411 U.S. 693, 710–717, this Court recognized that the pendent party doctrine presented "a subtle and complex question with far-reaching implications," 411 U.S. at 715, which the Court found it unnecessary to decide because it concluded that the district court there had not abused its discretion by refusing to exercise such jurisdiction on the facts of that case. In *Chris-*

tian v. *New York State Dept. of Labor*, 414 U.S. 614, 617, n. 3, this Court left open the question whether Section 1343(3) confers jurisdiction over federal officials where there has been joint participation between state and federal officers. Cf. *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144. Although "[t]he AFDC program is based upon a scheme of cooperative federalism," *King* v. *Smith*, 392 U.S. 309, 316, the interests of the two sovereigns do not necessarily coincide. See *supra*, pp. 14–15.

The question of the district court's jurisdiction over the Secretary in this case is difficult and complex. We believe there is no need for the Court to decide it here, however. If the Court agrees with our view that the statute does not permit AFDC payments to an individual who is eligible for unemployment compensation but waives it, then the case should be remanded for the district court to decide appellees' constitutional challenges to the statute as thus construed. On such remand, it would be appropriate to direct the district court to consider the jurisdictional issue further. If, on the other hand, this Court agrees with the district court's interpretation of the statute in this case in which jurisdiction over the state defendant has obviously been properly invoked, the jurisdictional question with respect to the Secretary would become inconsequential since the Secretary as well as the State would, of course, administer the statute in accordance with this Court's interpretation of it.

APPENDIX A

United States District Court for the District of Vermont

[Filed October 23, 1973]

JEAN GLODGETT AND DEANNA GLODGETT, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, TINA GLODGETT

ROGER PERCY, SR. AND ROSAMOND PERCY, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, SHARON, SHEILA, ROGER, MARY, MATTHEW AND CHARON PERCY, AND ALL OTHERS SIMILARLY SITUATED, AND

ROGER C. DEROSIA AND ARLENE M. DEROSIA; LARRY, HAROLD, ARTHUR, MARY AND BRIAN DEROSIA, MINORS, BY THEIR MOTHER AND NEXT FRIEND, ARLENE M. DEROSIA; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, INTERVENORS

v.

JOSEPH BETIT, INDIVIDUALLY AND AS COMMISSIONER OF THE VERMONT DEPARTMENT OF SOCIAL WELFARE; ELLIOTT RICHARDSON, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Civil Action No. 6550

OPINION

HOLDEN, DJ.

The Vermont Department of Social Welfare denies payment under its "Aid to Needy Families with Children" (ANFC) program to families in which the

father receives unemployment compensation.[1] During any week in which the father receives unemployment benefits, his family is held ineligible for any ANFC payments, even if the unemployment payment is less than the ANFC payment which the family otherwise would have received. Vermont must operate its ANFC program in this manner in order for the ANFC–UF ("Aid to Needy Families with Children—Unemployed Father") segment of the program to receive federal financial assistance under the federal "Aid to Families with Dependent Children" (AFDC) program.[2]

The named plaintiffs, Glodgett, Percy and Derosia, are the parents and minor children of Vermont families who were denied ANFC assistance because of the receipt of unemployment compensation by the father in each of these families. On December 17, 1971, the Glodgett family's application for ANFC was accepted and they were allotted a monthly benefit of $239.00. On January 12, two days after Mr. Glodgett began

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[1] Vermont Welfare Regulation 2333.1 provides in part:
"An 'unemployed father' is one whose minor children are in need because he is out of work, is working part time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that:

* * * * * * *

"3. He is not receiving Unemployment Compensation during the same *week* as assistance is granted."

[2] Although each state may refuse to participate in the federal welfare program, once a state decides to participate it must maintain a system consistent with the Social Security Act. See *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971); *Rosado* v. *Wyman*, 397 U.S. 397, 419–20 (1970); *King* v. *Smith*, 392 U.S. 309, 316–317 (1968). If a state elects to provide ANFC benefits to families with unemployed fathers (ANFC–UF), 42 U.S.C. § 607(b)(2)(C)(ii) requires that the state plan must deny benefits under § 607 during any week in which the father receives unemployment compensation. See text, infra.

receiving unemployment compensation from New Hampshire of $14.00 per week, he was notified by the state that his ANFC payments would be terminated as of February 16, 1972, by reason of his receiving unemployment compensation. The ANFC grant was reinstated soon after Mr. Glodgett ceased receiving unemployment benefits in March.

When Roger Percy's employment as a trucker was suspended, he began receiving unemployment benefits of $172.00 per month. Because of his receipt of unemployment compensation, his family was denied ANFC payments which would have totalled $410.00 per month, had the family not been disqualified.

On October 25, 1972, the Derosia family qualified for ANFC assistance in the amount of $394.00 per month. On November 6 Mrs. Derosia notified Social Welfare that the family was receiving unemployment compensation of $56.00 per month. For this reason the Derosias' ANFC grant was terminated as of December 1, 1972.

The plaintiffs seek injunctive and compensatory remedies on their own behalf and also on behalf of the class they claim to represent. More particularly, they seek the following relief: permission to maintain this action as a class action; a declaration that 42 U.S.C. § 607(b)(2)(C)(ii) and Vermont Welfare Regulation 2333.1 are unconstitutional because they respectively violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. They seek an order enjoining the enforcement of the statute and regulation against the plaintiff class and compensatory ANFC benefits paid retroactively to the plaintiffs and class in the same amount that they would have been paid under 42

U.S.C. § 606,[3] or as if the mother, instead of the father, had been receiving unemployment compensation.[4] They further request an order directing the Secretary of HEW to approve the Vermont ANFC–UF program without requiring the inclusion of a provision disqualifying families with fathers receiving unemployment compensation; and such further relief as the court deems appropriate. At oral argument the plaintiffs advanced an additional statutory claim, contending that Vermont Welfare Regulation 2333.1 is enforced inconsistently with 42 U.S.C. § 607(b)(2)(C)(ii).

A three-judge court was convened, as required by 28 U.S.C. §§ 2281–2282, since injunctive relief is sought against state and federal enactments on constitutional grounds. The defendant Betit at the time the action was commenced was Commissioner of Social Welfare for the State of Vermont. The defendant Richardson was then Secretary of the Department of Health, Education, and Welfare. All parties have moved for summary judgment. Both defendants have moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

Class Action Status

The named plaintiffs contend they are representative of a class of Vermont families deprived of ANFC

[3] Section 606, through the definition of "dependent child", authorizes payments to families in which a child has been deprived of parental support by reason of the death, absence or incapacity of a parent. See text, infra.

[4] Section 607(b)(2)(C)(ii) provides for the disqualification from ANFC–UF benefits of families in which the father receives unemployment payments, but does not disqualify families in which the mother receives unemployment benefits. See text, infra.

because the father receives unemployment compensation. In their complaint they request certification of this suit as a class action.

While the defendants do not contest the class action status of this suit, before the action may so proceed the court is called upon to determine whether the action is maintainable as a class suit. Fed. R. Civ. P. Rule 23(c)(1);[5] *Jackson* v. *Cutter Laboratories,* 338 F. Supp. 882, 886 (E.D. Tenn. 1970). An action is not maintainable as a class action merely because it is so designated in the pleadings. *Cash* v. *Swifton Land Corporation,* 434 F. 2d 569, 571 (6th Cir. 1970); *In re Swan-Finch Oil Corporation,* 279 F. Supp. 386, 391 (S.D. N.Y. 1967). To the contrary, the plaintiffs in a purported class action bear the burden of establishing that their action meets the prerequisites of Rule 23. *Rossin* v. *Southern Union Gas Company,* 472 F. 2d 707, 712 (10th Cir. 1973); *Poindexter* v. *Teubert,* 462 F. 2d 1096, 1097 (4th Cir. 1972); *Daye* v. *Commonwealth of Pennsylvania,* 344 F. Supp. 1337, 1342 (E.D. Pa. 1972); *Clark* v. *Thompson,* 206 F. Supp. 539, 542 (S.D. Miss. 1962), aff'd 313 F. 2d 637 (5th Cir. 1963), cert. denied 375 U.S. 951 (1963); *Free World Foreign Cars, Inc.* v. *Alfa Romeo,* 55 F.R.D. 26, 29 (S.D. N.Y. 1972); see *Demarco* v. *Edens,* 390 F. 2d 836, 845 (2d Cir. 1968); *Phillip* v. *Sherman,* 197 F. Supp. 866, 869 (N.D. N.Y. 1961). This burden imposes upon the plaintiffs in a purported class action the responsibility to move for formal certification of their class action by the court under Rule 23(c)(1). *Herbst* v. *Able,* 45 F.R.D. 451,

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[5] Rule 23(c)(1) provides:

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

453 (S.D. N.Y. 1968); *Ziegler* v. *Gibralter Life Insurance Company,* 43 F.R.D. 169, 170 (D. S.D. 1967).

In this case, beyond their request for certification in their complaint, the plaintiffs have not sought a formal determination of class action status. Thus the vital issues concerning the adequacy of representation which underly any representative action remain unattended and unresolved. The question of adequacy of representation, see *Hansberry* v. *Lee,* 311 U.S. 32, 41–43 (1940); *Herbst* v. *Able,* supra at 453, has not been answered. Nor have important issues concerning notice: whether notice is required not only if the damages aspect of the action is to be maintained, see *Eisen* v. *Carlisle & Jacquelin,* 479 F. 2d 1005, 1015 (2d Cir. 1973), but also if injunctive relief is sought on behalf of the class under Rule 23(b)(2), compare *Eisen* v. *Carlisle & Jacquelin,* 391 F. 2d 555, 564–565 (2d Cir. 1968); *Schrader* v. *Selective Service System Local Board No. 76 of Wisconsin,* 470 F. 2d 73, 75 (7th Cir. 1972); *Zachary* v. *Chase Manhattan Bank,* 52 F.R.D. 532, 535 (S.D. N.Y. 1971), with *Yaffe* v. *Powers,* 454 F. 2d 1362, 1366 (1st Cir. 1971); *Johnson* v. *Georgia Highways Express, Inc.,* 417 F. 2d 1122, 1125 (5th Cir. 1969); *Woodward* v. *Rogers,* 344 F. Supp. 974, 980 N. 10 (D. D.C. 1972); *Vaughns* v. *Board of Education of Prince George's County,* 355 F. Supp. 1034, 1035 (D. Md. 1972); *Northern Natural Gas Co.* v. *Grounds,* 292 F. Supp. 619, 636 (D. Kan. 1968); 3B Moore, Federal Practice, ¶ 23.72, pp. 1421–1422 (1969). And if prejudgment notice is required here, the mechanics involved, such as the form the notice should take, have not been dealt with by the parties. Compare *Eisen* v. *Carlisle & Jacquelin,* 479 F. 2d 1005, 1015 (2d Cir. 1973), with e.g., *Lopez* v. *Wyman,* 329 F. Supp. 483, 486 (W.D. N.Y. 1971); *Snyder* v. *Board of Trustees of the University of Illinois,* 286 F. Supp. 927 (N.D. Ill. 1968).

Despite the fact that these issues have not been attended to, the plaintiffs have pressed their motion for summary judgment. Without a determination of these issues, a representative action which seeks to affect the rights of absent parties may not proceed. See *Hansberry* v. *Lee,* supra; *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950). In moving for summary judgment without having sought a formal certification of this action as a class action, the plaintiffs leave us no choice but to dismiss the class aspects of this suit, on the ground that the plaintiffs have failed to meet their burden to prove that the action meets the prerequisites of Rule 23.

Jurisdiction

Section 1343(3) of Title 18, United States Code, affords jurisdiction over plaintiffs' claims against both the state and the federal defendant. *Aguayo* v. *Richardson,* 473 F. 2d 1090, 1102 (2d Cir. 1973); *cf. Macias* v. *Finch* (324 F. Supp. 1252 (N.D. Calif. 1970); (3-Judge Court), aff'd *sub nom Macias v. Richardson,* 400 U.S. 913 (1970); *Connor* v. *Finch,* 314 D. Supp. 364 (N.D. Ill. 1970), (3-Judge Court), aff'd *sub nom Conner* v. *Richardson,* 400 U.S. 1003 (1971); but see *Stinson* v. *Finch,* 317 F. Supp. 581 (D. Ga. 1970), (3-Judge Court). Section 1343(3) provides original jurisdiction in the United States District Court of actions seeking redress for deprivations of constitutional rights occurring under color of state law or regulation.[6]

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[6] 28 U.S.C. § 1343(3) provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage,

The plaintiffs have been denied ANFC–UF benefits, arguably in violation of their constitutional rights, under color of Vermont Welfare Regulation 2333.1. There is plainly subject matter jurisdiction over this suit under 28 U.S.C. § 1343(3), albeit that there is no specific assertion of jurisdiction on this statute.

As defendant Betit is responsible for enforcing the state regulation in question, he is responsible in part for the denial of benefits to the plaintiffs, so there is jurisdiction over the claim against him. There is also jurisdiction over the claim against the Secretary of HEW, since his enforcement of 42 U.S.C. § 607(b)(2)(C)(ii) requires the defendant Betit to deny ANFC benefits to the plaintiffs. Thus he is partially responsible for the deprivation of which all the plaintiffs complain.[7]

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of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[7] All that section 1343(3) requires for the exercise of jurisdiction is an alleged deprivation of Constitutional rights effected under color of state law or regulation. Given such a state action, which concededly occurred here, it is necessary to join as party defendants all persons responsible for that action. While the *Stinson* court felt that a Secretary of HEW could not properly be joined, because of his administration of a federal matching grant statute, as a party defendant to a civil rights action challenging the state statutory program receiving the matching funds, we do not agree.

First, the *Stinson* court took the view that 28 U.S.C. § 1391(e) barred the exercise of personal jurisdiction over the Secretary by the court in the district where the claim arose, if a non-federal party were joined as a party defendant. The law in this circuit is to the contrary. *Liberation News Service* v. *Eastland*, 426 F. 2d 1379, 1382 n. 5 (2d Cir. 1970).

Second, it is highly unrealistic to suppose that the threat by a federal official of a denial to a state of federal ANFC–UF

The failure of the plaintiffs to plead section 1343(3) as a basis for the court's authority over the claim against the Secretary is not a serious jurisdictional defect. While it is the duty of the court to take note of any defects of jurisdiction so that the mandate of the statutes which limit jurisdiction will be observed, *Arnold* v. *Truccoli,* 344 F. 2d 842 (2d Cir. 1965), a statute conferring federal jurisdiction need not be specifically pleaded if facts giving the court jurisdiction are set forth in the complaint. *New York State Waterways Association, Inc.* v. *Diamond,* 469 F. 2d 419, 421 (2d Cir. 1971); *Eidschun* v. *Pierce,* 335 F. Supp. 603, 615 (D. Ia. 1971); see also *Phillips* v. *Rockefeller,* 321 F. Supp. 516 (S.D. N.Y. 1970), aff'd 435 F. 2d 976 (2d Cir. 1970). The motions of the defendants to dismiss for want of jurisdiction of the subject matter of this controversy must be denied.

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matching funds, in retaliation for a refusal by the state to operate its ANFC–UF program in a certain way, does not make that official partially responsible for the manner in which the program is operated. The *Stinson* court's denial of this responsibility would sanction a federal statute which, arguably, authorizes the states to violate the Equal Protection Clause, contrary to the express prohibition against such Congressional action in *Shapiro* v. *Thompson*, 394 U.S. 618, 641 (1969).

To the extent there is any doubt about the propriety of extending 1343(3) jurisdiction over the claim against the federal defendant here, the doubt should be resolved in favor of jurisdiction, to avoid the anomaly of denial of federal jurisdiction over a suit against a federal officer challenging the constitutionality of a federal statute involving social welfare, an area in which the federal courts have particular expertise. See Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 69–70, 121–122; Wright, LAW OF FEDERAL COURTS 110; *Aguayo* v. *Richardson*, 473 F. 2d 1090, 1102 (2d Cir. 1973).

The Statutory Scheme

Title IV (42 U.S.C. § 601 et seq.) of the Social Security Act provides for a cooperative federal-state program to assist needy families with children. States are not required to establish such programs. If they do, they must submit their plan to the Secretary for approval. Every state has established such a program.[8] If the plan submitted meets the requirements of 42 U.S.C. § 602(a) and contains none of the conditions prohibited in § 602(b), then the Secretary "must approve" it. Upon approval, the state becomes entitled to receive substantial federal funding for payments made in accordance with the plan and applicable federal conditions. Vermont's plan has been approved by the Secretary.

As originally established by the Social Security Act of 1935, the program for aid to dependent children did not provide for the needs of children caused by the unemployment of a parent. *King* v. *Smith*, 392 U.S. 309, 327–330 (1968). In 1961 the Act was amended to allow states the option of extending coverage to children who were needy because of the unemployment of a breadwinning parent. The 1961 amendment provided that a state could, if it chose to do so, deny all or any part of an AFDC stipend to a family during any month in which the supporting parent received unemployment compensation.

In 1968 the section of the act relating to AFDC–UF was amended to include the provisions challenged here. Benefits became available to a family whose need was occasioned by the unemployment of a father,

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[8] *Dandridge* v. *Williams*, 397 U.S. 471, 472–473 (1970). For a general picture of AFDC as established by the Social Security Act, see *King* v. *Smith*, 392 U.S. 309 (1968); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Dandridge* v. *Williams*, supra.

under standards prescribed by the Secretary; formerly, benefits accrued to a family whose need was caused by the unemployment of a parent, as defined by the state. The 1968 amendment also mandated denial of benefits to a family during any week in which the father received unemployment compensation. Formerly the Act allowed the state the option of enforcing a complete or partial denial of benefits, or a full stipend without reduction, for any month during which the parent received unemployment compensation.

Section 606(a), by definition of "dependent child," provides for assistance to families who are needy because of deprivation of parental support or care by reason of the death, continued absence or physical or mental incapacity of a parent. Section 607 enlarges this coverage to authorize benefits to children who are needy as a result of the unemployment of the father.

Section 607(b) makes this extended coverage applicable "to a State if the State's plan, approved under Section 602 of this title—

> (2) provides—
>
> (C) for the denial of aid to families with dependent children to any child or relation specified in subsection (a) of this section—
>
> (i) if, and for so long as, such child's father is not currently registered with the public employment office in the State, and
>
> (ii) with respect to any week for which the child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States."

Vermont has elected to extend its ANFC program to include those who have been deprived of parental support or care by reason of the unemployment of

the father under 42 U.S.C. § 607. In response to the requirements of that section, it has promulgated Welfare Regulation 2333.1. This regulation renders the family of an unemployed father eligible for ANFC–UF benefits if the father "is not receiving Unemployment Compensation during the same *week* as assistance is granted." (Emphasis in original text.)

This is in contrast to the treatment afforded ANFC families who receive income in a form other than unemployment compensation received by the father. The receipt of such income does not render the family ineligible for ANFC; the amount of the receipt is simply deducted from the ANFC payment which the family would normally receive.[9]

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[9] Under the Vermont plan, approved by the Secretary of HEW as consistent with the requirements of the Social Security Act, receipt of income does not render a family per se ineligible for ANFC. If the amounts received are insufficient to bring the family's income above the state-determined standard of need, those amounts are simply subtracted from the amount of the grant to which the family is entitled. Under Vermont Welfare Regulation 2601, the "Vermont ANFC payment level" is defined as the sum of the ANFC basic needs standard and shelter expense, minus "the budgeted income of the applicant and his legal dependents." "Budgeted income" is defined as "gross monthly income received from any source by the applicant and his legal dependents without income exclusions for any purpose." *Id.* "Unearned income" is explicitly defined to include "income from pension and benefit programs, such as Social Security, Railroad Retirement, veteran's pension or compensation, Unemployment Compensation, employer or individual private pension plans and/or annuities, etc." Vermont Welfare Regulation 2253.

For example, suppose a family is in need because of the father's illness and the father receives a veteran's pension. The family is not disqualified from receiving ANFC. If it is eligible for ANFC, it receives an ANFC payment equal to the

The Statutory Claim

The plaintiffs rely on the language of § 607 to assert the claim that an unemployed father can avoid disqualification from ANFC–UF benefits by refusing to accept unemployment compensation. In this they rightfully maintain that a family eligible for ANFC benefits under section 607 can be excluded only for each week in which unemployment compensation is actually received by the father. It is clear from the language of the statute that the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation. And in this construction the defendants concur. We find nothing in the legislative history of the enactment at variance with this construction.

Since actual payment of unemployment compensation is the controlling factor, rather than eligibility for such payment, the statute affords the unemployed father an option. There is no compulsion that he accept unemployment compensation. He may accept such payment and forego ANFC–UF benefits for himself and his family, or he may accept the benefits afforded by the ANFC–UF program at the cost of surrendering unemployment compensation. The option is to receive (a) ANFC without unemployment compensa-

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state standard of need reduced by the amount of the veteran's benefit.

We use the term "state standard of need" to mean the amount of money that a family qualifying for ANFC is entitled to receive. The standard varies according to the number of persons in the group eligible for assistance, the number of persons in the household where the group resides, the place of residence of the group, and the form of housing involved, and includes funds to allow the recipient group to purchase the necessities of life: food, clothing, fuel, utilities, housing, etc. Vermont Welfare Regulation 2211.1-2211.2.

tion, or (b) unemployment compensation without ANFC. We construe this option to operate as follows: If a father otherwise eligible for ANFC–UF receives unemployment benefits which are less than the ANFC payment for which he qualifies, he can reject the unemployment check in favor of the ANFC payment, thereby receiving an income consistent with the state standard of need. If, on the other hand, he receives an unemployment check which is larger than his ANFC stipend would be, he can accept it, and thereby forego his right to ANFC for that week. In either event, the option available to him will provide total income equal to or greater than the state standard of need.

This result provides the same relief the plaintiffs seek to achieve by way of their constitutional claims. In those claims the plaintiffs seek a judicial determination that families of unemployed fathers applying for AFDC should receive the same treatment as families in need for other reasons, who qualify for AFDC under § 606. Their concern is that families of unemployed fathers, like other families applying for AFDC, should be assured of receiving an income equal to the state standard of need, irrespective of their eligibility to receive outside income. The option afforded by our construction of 42 U.S.C. § 607(b)(2)(C)(ii) provides this protection. Since our construction of this statute resolves this case, we are precluded from reaching the plaintiffs' constitutional claims. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936), (Brandeis, J., concurring).

It is not clear from the information before the court the extent to which the plaintiffs have been damaged financially by the failure of the Vermont Department of Social Welfare to afford them a choice between unemployment compensation and ANFC–UF. It ap-

pears from oral argument and from the stipulated facts filed by the parties that, to an extent which has not been made precisely clear, the State of Vermont supplemented the plaintiffs' unemployment compensation checks with funds from General Assistance, thereby reducing the actual loss each plaintiff suffered when his family was disqualified from ANFC–UF. If the plaintiffs are able to make a showing that they have suffered pecuniary loss as a result of this disqualification, we consider it a proper exercise of our equitable powers to afford the plaintiffs the option of re-tendering their unemployment compensation benefits and receiving ANFC benefits in lieu thereof for the relevant weeks in which the receipt of unemployment compensation has adversely affected the financial interest of the family concerned.

The parties are directed to prepare a proposed decree for approval by the court in accordance with the views expressed in this opinion.

Dated at Montpelier, in the District of Vermont, this 17th day of October, 1973.

/s/ JAMES L. OAKES, C.J.,
/s/ JAMES S. HOLDEN,
/s/ ALBERT W. COFFRIN, D.JJ.

APPENDIX B

United States District Court for the District of Vermont

[Filed January 8, 1974]

[Title Omitted in Printing]

Supplemental Opinion and Order

Plaintiffs have filed a motion for rehearing on dismissal of the class action. Defendant Philbrook has filed a motion for a new trial.

Since the motion for a new trial presents nothing for consideration that was not presented to the court originally and is in essence a petition for rehearing, it is hereby denied.

While the motion for rehearing on dismissal of the class action may present viable matter, since the original decision of the court and motion here filed, the United States Court of Appeals for the Second Circuit has held in *Galvan* v. *Levine,* No. 73–1294 (2d Cir. Dec. 3, 1973), slip op. 559, 567, that where the relief sought as to the class, as here, is prohibitory only, that is, seeks only declaratory or injunctive relief, and class action designation is therefore largely a formality, what is important is that the "*judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated . . . ." *Id.* at 569. We would assume that the State here would have understood the judgment to bind it in the future with respect to all claimants, in any event. Lest there be any mistake, however, in submitting a decree for our sig-

nature pursuant to the final paragraph of the opinion dated October 17, 1973, appropriate language to insure that the decree runs for the benefit of all others similarly situated in the future is hereby directed to be included. To the extent that plaintiffs' motion seeks to have retroactive reimbursement for unnamed parties, members of plantiffs' class, in line with the actual relief given to the named plaintiffs and intervenors, class action designation is hereby refused, such a class action being unmanageable, notice being impracticable, and defendant being put to unwarranted inequitable administrative difficulty thereby.

Done this 28th day of December, 1973.

/s/ JAMES L. OAKES,
U.S. Circuit Judge,

/s/ JAMES S. HOLDEN,
U.S. District Judge,

/s/ ALBERT W. COFFRIN,
U.S. District Judge.

APPENDIX C

United States District Court for the District of Vermont

[Filed February 20, 1974]

[Title Omitted in Printing]

Order of Judgment

Upon the basis of the evidence, the arguments of counsel, and the opinions of this court dated October 17, 1973 and December 28, 1973, it is ordered, adjudged and decreed that:

(1) 42 USC § 607(b)(2)(c)(ii), 45 CRF § 233.100 (a)(5)(ii) and Vermont Welfare Regulation 2331.1 excludes families in which the father is unemployed from benefits only for those weeks in which the father actually receives state unemployment compensation. The disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation, and there is no compulsion to accept UCC. If the father receives UCC benefits which are less than the ANFC payment for which he qualifies, he is afforded, under the statute, an option and can reject the UCC check in favor of the ANFC payment, thereby receiving an income consistent with the state standard of need.

(2) The Department of Social Welfare shall advise applicants who have been certified as eligible for ANFC–UF that they may elect to reject their UCC payments in favor of the ANFC payment for which they are otherwise qualified.

(3) The Secretary of HEW shall approve the Vermont ANFC–UF program in accordance with the interpretation given Section 607(b)(2)(c)(ii).

(4) This order shall bind the defendants from the date of judgment with respect to all others similarly situated as the plaintiff.

(5) Plaintiffs Glodgett, Percy and Derosia shall be given the option of retendering their unemployment compensation benefits and receiving ANFC benefits in lieu thereof, less any General Assistant paid, for the relevant weeks in which the receipt of unemployment compensation has adversely affected the financial interest of the family concerned.

Upon stipulation by the parties, if the above-mentioned named plaintiffs elect to retender their UCC and GA grants, payments, taking into account those grants, would be made as follows: $207.17 to the Glodgetts, $342 to the Percys, and $21.20 to the Derosias.

DATED at Burlington in the District of Vermont, this 20th day of February, 1974.

SO ORDERED.

/s/ JAMES L. OAKES,
U.S. Circuit Judge,

/s/ JAMES S. HOLDEN,
U.S. District Judge,

/s/ ALBERT W. COFFRIN,
U.S. District Judge.

APPENDIX D

United States District Court for the
District of Vermont

[Filed April 19, 1974]

[Title Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Casper W. Weinberger, individually and as Secretary of the Department of Health, Education, and Welfare, appellant above named, hereby appeals to the Supreme Court of the United States from the final order of a Three-Judge District Court entered in this action on February 21, 1974.

This appeal is taken pursuant to 28 USC Sec. 1253
Dated: April 19, 1974.

/s/ GEORGE W. F. COOK,
United States Attorney.

Attorney for Appellant Casper W. Weinberger, individually and as Secretary of the Department of Health, Education, and Welfare.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
DEC 31 1974
MICHAEL RODAK, JR., CLERK

No. 74-132

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

JEAN GLODGETT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLANT

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CARLA A. HILLS,
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No 74–132

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

JEAN GLODGETT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The original (J.S. App. 1A–15A) and supplemental (J.S. App. 16A–17A) opinions of the district court are reported at 368 F. Supp. 211 and 218.

JURISDICTION

The judgment of the district court (J.S. App. 18A–19A) was entered on February 20, 1974. The government's notice of appeal to this Court (J.S. App. 20A) was filed on April 19, 1974. By orders entered June 12, 1974, and July 10, 1974, Mr. Justice Marshall extended the time for docketing the appeal to August 17, 1974, and the jurisdictional statement was filed on that date.

On October 29, 1974, the Court postponed consideration of the jurisdictional question to the hearing on the merits (App. 105–106).

The jurisdiction of this Court rests on 28 U.S.C. 1253, since the decision below was entered by a three-judge court properly convened under 28 U.S.C. 2281 and 2282 to consider this action to restrain the enforcement of 42 U.S.C. 607(b)(2)(C)(ii) and Vermont Welfare Regulation 2333.1 as unconstitutional. See *King* v. *Smith,* 392 U.S. 309; *Flast* v. *Cohen,* 392 U.S. 83. As this Court recently recognized in *Hagans* v. *Lavine,* 415 U.S. 528, 543, an appeal lies to this Court where a three-judge court was properly convened, even though the court disposed of the case on a nonconstitutional ground.

QUESTIONS PRESENTED

1. Whether the district court properly held that 28 U.S.C. 1343(3), which applies to actions "[t]o redress the deprivation, under color of any State law, * * * of any right, privilege or immunity secured by the Constitution * * *," confers jurisdiction over the Secretary of Health, Education, and Welfare in this action challenging the constitutionality of 42 U.S.C. 607(b)(2)(C)(ii).

2. Whether 42 U.S.C. 607(b)(2)(C)(ii), and Vermont Welfare Regulation 2333.1, which bar families from receiving benefits under the federally-assisted Aid to Families with Dependent Children ("AFDC") program if the father receives unemployment compensation, give the father the option to decline unemployment compensation for which he is eligible in order for his family to obtain larger AFDC benefits.

STATUTES AND REGULATIONS INVOLVED

Section 407(b)(2)(C) of the Social Security Act, as amended, 42 U.S.C. 607(b)(2)(C), requires that, to be eligible for federal financial assistance, state AFDC programs must provide:

> for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—
>
> * * * * *
>
> (ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

Vermont Welfare Regulation 2333.1 provides in part (emphasis in original):

> An "unemployed father" is one whose minor children are in need because he is out of work, is working part time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that:
>
> * * * * *
>
> 3. He is not receiving Unemployment Compensation during the same *week* as assistance is granted.

Section 402(a)(7) of the Social Security Act, 42 U.S.C. 602(a)(7), requires that to be eligible for federal financial participation, a state AFDC plan must:

> except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent

children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earnings of any such income; * * *

Regulations of the Department of Health, Education, and Welfare at 45 C.F.R. 233.20 provide in part:

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * * * *

(3) *Income and resources;* OAA, AFDC, AB, APTD, AABD.

* * * * *

(ix) Provide that the agency will establish and carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability.

STATEMENT

This case arises under Title IV of the Social Security Act, 42 U.S.C. 601, *et seq.*, which governs the Aid to Families with Dependent Children ("AFDC") program. The AFDC program is designed to provide public assistance on behalf of dependent children through a system of federal and state funding. In order to receive federal funding, state AFDC plans must comply with certain requirements set forth in the Act, as implemented by regulations of the Department of Health, Education, and Welfare, 45 C.F.R. 200, *et seq.*

The AFDC program is directed primarily to children who are dependent because of the "death, continued absence from the home, or physical or mental incapacity of a parent * * *." 42 U.S.C. 606(a). In addition, state AFDC plans may include children who are dependent because of the unemployment of their father. If a state plan includes children of unemployed fathers, Section 407(b)(2)(C)(ii) of the Act, 42 U.S.C. 607(b)(2)(C)(ii), requires that the state plan provide for the denial of AFDC benefits "with respect to any week for which such child's father receives unemployment compensation * * *." The Vermont AFDC plan includes children of unemployed fathers, and Vermont Welfare Regulation 2333.1 requires denial of AFDC benefits during any week when such fathers receive unemployment compensation.

This action was brought against the Secretary of Health, Education, and Welfare and the Commissioner of Vermont's Department of Social Welfare by three families claiming AFDC benefits. Each of the families was denied benefits on the ground that the father was receiving state unemployment compensation. In each instance, the amount of the unemployment compensation was less than the amount of AFDC benefits.[1]

Plaintiffs sought to have Section 407(b)(2)(C)(ii) and Vermont Welfare Regulation 2333.1 declared invalid and their enforcement enjoined as contrary to the Due Process and Equal Protection Clauses of the

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[1] A comparison on a monthly basis of the AFDC benefits denied and unemployment compensation received by the plaintiffs is shown below (J.S. App. 2A–3A):

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Fifth and Fourteenth Amendments (App. 7–12). They also sought to represent the class of all Vermont families excluded from AFDC benefits because the father receives or is eligible for unemployment compensation (App. 11).

The three-judge district court did not reach the constitutional question because it awarded plaintiffs relief on a statutory ground. Initially, the court held that a three-judge court was appropriate under 28 U.S.C. 2281 and 2282 (J.S. App. 4A). Also, although the court's original opinion held that plaintiffs had not proved that their suit met the requisites for a class action (J.S. App. 4A–7A), its supplemental opinion states that the class action designation is largely a formality in that the judgment will bind the State as to all similarly situated persons in the future (J.S. App. 16A–17A). Jurisdiction over both state and federal defendants was sustained under 28 U.S.C. 1343(3) (J.S. App. 7A–9A).

On the merits, the court held that Section 407(b)(2)(C)(ii) affords fathers the option of refusing unemployment compensation in order to obtain the higher AFDC benefits. In its view, the language of this AFDC provision indicates "that the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation" (J.S. App. 13A).

(Continued)

	AFDC	Unemployment compensation
Glodgett	$239	$60
Derosia	394	56
Percy	410	172

The court's judgment incorporates this statutory construction holding as declaratory relief, orders Vermont to advise AFDC applicants of their option to refuse unemployment compensation, and further orders the Secretary to approve Vermont's AFDC program in accordance with the court's construction of Section 407(b)(2)(C) (J.S. App. 18A–19A). The Glodgett, Percy, and Derosia families were awarded retroactive relief since the judgment grants them the option of retendering their unemployment compensation plus any amounts received under Vermont's non-federally assisted general assistance program, in order to obtain AFDC benefits (J.S. App. 19A). By stipulation, if this option is exercised, the Glodgetts will receive a total of $207.17; the Percys, $342; and the Derosias, $21.20 (J.S. App. 19A).

As to all similarly situated Vermont AFDC applicants, the district court granted only prospective relief (J.S. App. 19A), which was conditionally stayed pending appeal or further order of the district court (App. 103–104). The stay was subject to the condition that Vermont provide supplemental financial assistance to those families who would be eligible for AFDC benefits but for the father's receipt of unemployment compensation. The amount of the supplemental assistance was stipulated to be the difference between the AFDC benefits for which the family would otherwise qualify and the family's earned or unearned income, including unemployment compensation (App. 103).

Both the state (No. 73–1820) and the federal defendants appealed from the district court's judgment.

On October 29, 1974, this Court ordered the cases consolidated, noted probable jurisdiction in Vermont's appeal, and postponed further consideration of the jurisdictional question in the federal case pending a hearing on the merits (App. 105–106).

SUMMARY OF ARGUMENT

I

Although 28 U.S.C. 1343(3) confers jurisdiction only to redress deprivations of rights "under color of any State law," the district court held that this provision confers jurisdiction over the Secretary in this action. It reached this result by applying the pendent party doctrine, which this Court recognized in *Moor* v. *County of Alameda,* 411 U.S. 693, 715, presents a "subtle and complex question * * *." The question was left open in *Moor,* and we submit that it need not be resolved here. The merits of the dispute are properly before the Court in Vermont's appeal. The Secretary will, of course, abide by the construction of 42 U.S.C. 607(b)(2)(C)(ii) adopted by this Court. In the event the case is remanded for additional proceedings—the result we advocate—we intend to resolve the jurisdictional problem by intervening pursuant to 28 U.S.C. 2403.

II

Section 407(b)(2)(C)(ii) of the Social Security Act, 42 U.S.C. 607(b)(2)(C)(ii), requires denial of AFDC benefits for any week during which the father "receives" state or federal unemployment compensa-

tion. The district court construed this section to permit the father to waive unemployment compensation which he is entitled to receive in order for his family to obtain AFDC benefits when those benefits are more than the unemployment compensation. For several reasons, however, this construction is erroneous.

The structure of the Social Security Act shows that AFDC is to be available only as a last resort. This philosophy is reflected in Section 402(a)(7), which requires states to consider all of the other income and resources available to an AFDC applicant. *Shea* v. *Vialpando,* 416 U.S. 251, 261. The evolution of the present Section 407(b)(2)(C)(ii) also plainly reveals that Congress did not intend AFDC payments to be made when unemployment compensation is available.

In addition, the longstanding administrative implementation of Section 402(a)(7) is that both actual and "potential sources of income that can be developed to a state of availability" must be considered in determining need of AFDC applicants. 45 C.F.R. 233.20(a)(3)(ix). This policy, which is entitled to deference by this Court, conflicts with the holding below that a father can refuse to accept unemployment compensation in order to obtain AFDC.

The legislative history of Section 407(b)(2)(C)(ii) expressly confirms this position. The section was originally enacted in 1968, and the Conference Report to that Act specifically describes Section 407(b)(2)(C)(ii) as barring AFDC where the "fathers * * * receive (or are qualified to receive) any unemployment compensation under State law." H. Rep. No. 1030, 90th Cong., 1st Sess. 57.

The question of the relationship between AFDC and unemployment compensation has arisen in only one other case. In *Burr* v. *Smith,* 322 F. Supp. 980 (W.D. Wash.), affirmed, 404 U.S. 1027, the decision of the three-judge district court is consistent with our interpretation of Section 407(b)(2)(C)(ii).

Finally, under the holding of the court below, the entire cost of assisting a needy family whose father is unemployed could be shifted to the AFDC program from the unemployment compensation program as supplemented by a state assistance program. This result is anomalous inasmuch as Congress has twice rejected a proposal which would have permitted AFDC to supplement, but not reduce, unemployment compensation.

ARGUMENT

I

THE DISTRICT COURT'S HOLDING THAT 28 U.S.C. 1343(3) CONFERS JURISDICTION OVER THE SECRETARY PRESENTS A DIFFICULT AND COMPLEX QUESTION WHICH THIS COURT NEED NOT RESOLVE

The district court took jurisdiction of this case solely under 28 U.S.C. 1343(3), which gives district court's jurisdiction over actions "[t]o redress the deprivation, under color of any State law, * * * of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens * * *." While the Social Security Act is not an "'Act of Congress providing for equal rights * * *'," *Almenares* v. *Wyman,* 453 F. 2d 1075, 1082, n. 9 (C.A. 2), certiorari denied, 405 U.S. 944; cf. *Georgia* v. *Rachel,* 384 U.S. 780, 792; *City of Greenwood* v. *Peacock,* 384 U.S. 808, 825,

nevertheless substantial constitutional challenges to state welfare statutes or regulations may be brought in the federal courts against state officials under Section 1343(3) and nonconstitutional claims presented in such cases may then be considered under the doctrine of pendent jurisdiction. *E.g., Hagans* v. *Lavine,* 415 U.S. 528, 536–543; *Rosado* v. *Wyman,* 397 U.S. 397, 402–405; *King* v. *Smith,* 392 U.S. 309, 312, n. 3.

By its terms, however, Section 1343(3) does not authorize jurisdiction over federal officials, who act under color of federal, not state, law. See *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652; *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 398, n. 1 (Harlan, J. concurring); *Gregoire v. Biddle,* 177 F. 2d 579, 581 (C.A. 2) (L. Hand, C. J.), certiorari denied, 339 U.S. 949; *Norton* v. *McShane,* 332 F. 2d 855, 862 (C.A. 5), certiorari denied, 380 U.S. 981; *Williams* v. *Rogers,* 449 F. 2d 513, 517 (C.A. 8), certiorari denied, 405 U.S. 926. In *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 547, this Court distinguished Section 1343(3) from 28 U.S.C. 1331 by stating that "in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction."[2] In accord with these deci-

[2] Although plaintiffs alleged that jurisdiction existed under 28 U.S.C. 1331 (App. 8), they conceded in the district court that their individual claims did not exceed $10,000 (See Plaintiffs' Memorandum of Law, p. 7, filed in the district court on September 20, 1972), and the judgment (J.S. App. 19A) shows that the concession was well-founded. Although plaintiffs sought to satisfy the jurisdictional amount by aggregating the claims of the purported class, such aggregation is barred by *Snyder* v. *Harris,* 394 U.S. 332, and *Zahn* v. *International Paper Co.,* 414 U.S. 291.

sions, other three-judge district courts have held that Section 1343(3) does not confer jurisdiction over the Secretary in actions challenging the constitutionality of the AFDC statute. *Stinson* v. *Finch,* 317 F. Supp. 581 (N.D. Ga.); *Ramirez* v. *Weinberger,* 363 F. Supp. 105 (N.D. Ill.), affirmed, 415 U.S. 970.

In the present case, the district court relied primarily (J.S. App. 7A) upon *Aguayo* v. *Richardson,* 473 F. 2d 1090 (C.A. 2), certiorari denied, 414 U.S. 1146. There jurisdiction over federal and state officials in an AFDC action was sustained under Section 1343 (3) by extending the doctrine of pendent jurisdiction to parties, as well as claims, not otherwise subject to the court's jurisdiction. In *Moor* v. *County of Alameda,* 411 U.S. 693, 710–717, this Court recognized that the pendent party doctrine presented "a subtle and complex question with far-reaching implications." 411 U.S. at 715. The Court found it unnecessary to decide that question in *Moor,* however, because it concluded that the district court had not abused its discretion by refusing to exercise such jurisdiction on the facts of that case.

Another possible basis for extending Section 1343 (3) to provide jurisdiction over federal officials is suggested by *Christian* v. *New York State Dept. of Labor,* 414 U.S. 614, 617, n. 3. There this Court left open the question whether Section 1343(3) confers jurisdiction over federal officials where there has been joint participation between state and federal officers. Cf. *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144. Even assuming the joint participation doctrine might be appropriate in some circumstances, its applicability

to the present case would be especially doubtful. Although "[t]he AFDC program is based on a scheme of cooperative federalism," *King* v. *Smith,* 392 U.S. 309, 316, the interests of the two sovereigns do not necessarily coincide. See *infra,* p. 28. Thus, the question of the district court's jurisdiction over the Secretary in this case is difficult and complex.

As in *Moor* and *Christian,* however, this jurisdictional question need not be resolved. If this Court agrees with the district court's interpretation of 42 U.S.C. 607(b)(2)(C)(ii) in this case in which jurisdiction over the state defendant has been properly invoked, the jurisdictional question with respect to the Secretary would become inconsequential since the Secretary as well as the State would, of course, administer the statute in accordance with this Court's interpretation. Cf. *Secretary of the Navy* v. *Avrech,* No. 72–1713, decided July 8, 1974.

If, on the other hand, this Court agrees with our view that the statute does not permit the payment of AFDC benefits to an individual who is eligible for, but declines, unemployment compensation, then the case should be remanded for the district court to decide appellees' constitutional challenges to the statute as thus construed. In that event, the government intends to end the jurisdictional controversy by filing a motion to intervene. Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as a matter of right "when a statute of the United States confers an unconditional right to intervene * * *." 28 U.S.C. 2403 provides in relevant part:[3]

[3] The fact that a federal officer was named as a party in the (Continued)

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.* * *

Thus, however this Court resolves the merits of the dispute, the difficult and complex question of whether 28 U.S.C. 1343(3) provides jurisdiction over the Secretary need not be decided.

II

SECTION 407(b) OF THE SOCIAL SECURITY ACT BARS A FAMILY FROM RECEIVING AFDC BENEFITS IF THE FATHER IS ELIGIBLE FOR UNEMPLOYMENT COMPENSATION

The district court construed Section 407(b)(2)(C)(ii) of the Act, 42 U.S.C. 607(b)(2)(C)(ii), which requires denial of AFDC benefits for any week during which a father "receives unemployment compensation" (the "mandatory bar), to afford such fathers the option of refusing to accept unemployment compensation in order to obtain AFDC benefits for their families (J.S. App. 13A–14A). As we now show, however, that holding is contrary to the basic structure of

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complaint should not preclude intervention. In *Morgan* v. *Katzenbach*, 247 F. Supp. 196 (D.D.C.), reversed on other grounds, 384 U.S. 641, the United States was permitted to intervene under 28 U.S.C. 2403 even though the Attorney General of the United States was named as a defendant.

the Social Security Act, its legislative history, consistent administrative construction, and the only precedent in point. Moreover, the district court's construction of Section 407(b)(2)(C)(ii) is likely to have the anomalous result of shifting significant costs in assisting the unemployed from the state unemployment compensation program, which is funded by taxes on private employers, to the AFDC program, which is funded by general federal and state revenues.

Appellees argued in their motion to affirm (pp. 6–7) that resort to the traditional aids to statutory construction is improper because the meaning of "receives" in Section 407(b)(2)(C)(ii) is unambiguous. To the contrary, however, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543–544 (footnotes omitted); *Cass* v. *United States*, 417 U.S. 72, 78–79. Moreover, the meaning of the word "receives" in Section 407(b)(2)(C)(ii) should not be determined "in isolation from the context of the whole Act" (*Richards* v. *United States*, 369 U.S. 1, 11), for, as this Court has held, "* * * in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence * * *, but [should] look to the provisions of the whole law, and to its object and policy'." *Ibid.* Thus, it is appropriate to consider the aids to statutory construction to which we now turn.[4]

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[4] In their complaint in the district court, plaintiffs challenged only the constitutionality of Section 407(b)(2)(C)(ii) and the

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1. The basic structure of the Social Security Act contemplates that state unemployment compensation

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Vermont regulation, stating that that section "provides that assistance * * * cannot be granted if the father is eligible for or receiving unemployment compensation" (App. 9; see, Transcript of March 5, 1973, p. 2). In the memorandum supporting our motion to dismiss the complaint or alternatively for judgment on the pleadings or summary judgment, we stated, "It is the receipt of unemployment benefits and not merely eligibility for such benefits which is the operative factor here; Section 607(b)(2)(C)(ii) turns on receipt of unemployment compensation, not eligibility for such benefits." Memorandum of Law in Support of Motions of Defendant Richardson, filed August 16, 1972, p. 7, n. 2. Subsequently, after the statutory construction issue was raised at oral argument (Transcript of March 5, 1973, pp. 42–44, 55–57), we submitted a supplemental memorandum stating:

"* * * Congress did not want to cut off AFDC solely on the basis of *eligibility* for unemployment compensation, where a delay of weeks between eligibility and actual payment might result from forces beyond the recipient's control, *e.g.*, state inefficiency or red tape. On the other hand, a recipient clearly may not take advantage of Congress' concern in this area by purposefully refusing unemployment compensation for which he is eligible, thereby defeating the comprehensive unemployment-AFDC scheme of Congress." Memorandum of Law, filed March 27, 1973, p. 6.

In this memorandum the government thus clarified its earlier position. The district court's statement that the defendants concur in its view that "the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation" (J.S. App. 13A) overlooks the clarifying statement in our memorandum of March 27, 1973.

The import of the government's memoranda in the district court and the position that we urge here is that while Congress did not intend to terminate AFDC benefits prior to the actual availability of unemployment compensation, neither did it intend that a father be permitted to decline unemployment compensation. Thus, eligibility for unemployment compensation imposes an obligation to exhaust this resource (Section 402(a)(7)). Failure to apply will result in denial of AFDC, but the

programs are to be the primary source of assistance to unemployed fathers, and that the federally-aided AFDC payments will be made only where such state compensation is not available. Section 402(a)(7) of the Act, 42 U.S.C. 602(a)(7), clearly shows that AFDC is to be available only as a last resort. That section states that, except as otherwise provided, "the State agency shall, in determining need [under the AFDC program], take into consideration any other income and resources of any child or relative claiming" AFDC. As this Court recently observed, "Congress has been careful to ensure that *all* of the income and resources properly attributable to a particular applicant be taken into account * * *." *Shea* v. *Vialpando,* 416 U.S. 251, 261 (emphasis in original).

Reflecting the congressional purpose that AFDC be a program of last resort, the longstanding administrative implementation of Section 402(a)(7) has required that in determining need of AFDC applicants, a state must consider both actual and "potential sources of income that can be developed to a state of availability." Department of Health, Education, and Welfare's Handbook of Public Assistance Administration, Pt. IV, § 3120 (1964), now 45 C.F.R. 233.20(a)(3)(ix). The Handbook makes clear that this policy is particularly applicable to statutory benefits that can be developed upon application, and unemployment compensation is specifically identified as such as a resource.

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mere fact that application has been made does not result in termination of AFDC benefits until such time as unemployment compensation is received or would have been received but for a father's refusal to accept it.

Department of Health, Education, and Welfare's Handbook of Public Assistance Administration, Pt. IV, § 3140(6). Thus, the Secretary has consistently maintained that the Act "does not give any individual a right to have his needs met out of an assistance program because of his refusal to accept any resource that is available to him upon application." [5]

The district court's construction of Section 407(b)(2)(C)(ii)—the mandatory bar provision—to permit an unemployed father to refuse unemployment com-

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[5] While this statement occurs in the provision which requires an AFDC applicant to apply for reduced old-age benefits at age 62, rather than awaiting eligibility for full benefits at age 65, it is clear that this principle is equally applicable to other statutory benefits enumerated in a subsequent provision of the Handbook which incorporates the old-age benefits provision by reference. The relevant portions of the Handbook provide:

"§ 3140(4). * * * Without question, the Act intends that such individuals should have a legal right to decide whether to file for the reduced benefits or wait until they reach sufficient age to receive benefits without reduction, just as any individual has the legal right to decide that he will not apply for any OASDI benefits under any circumstances. The Federal act, however, does not give any individual a right to have his needs met out of an assistance program because of his refusal to accept any resource that is available to him upon application.

"§ 3140(6). In addition to OASDI, other statutory benefits to which applicants and recipients for public assistance may qualify, include unemployment insurance, temporary disability insurance, railroad retirement benefits, civil service retirement benefits, other government retirement benefits (Federal, State, county and local), and veterans benefits.

"It is important that the State's policies and procedures for determining eligibility on the basis of need include clear instructions to staff for identifying cases in which such statutory benefits might be a resource, and, with respect to such cases, the process of determining the availability of such resources."

pensation effectively nullifies Congress' intent that an AFDC applicant develop income from all available resources.[6]

2. The district court's construction of the mandatory bar provision is also contrary to the congressional policy concerning unemployment compensation programs. The history of Congress' adjustments of the relationship between AFDC and employment compensation demonstrates that Congress intended that AFDC not be available when unemployment compensation can be obtained.

Congress first provided incentives for states to establish AFDC and unemployment compensation programs in the Social Security Act of 1935. 49 Stat. 620. In its original form, AFDC was not available to children of unemployed fathers. Congress viewed unemployment compensation as the means by which persons temporarily out of work would be aided until they found new employment. As this Court recognized in *California Human Resources Dept.* v. *Java,* 402 U.S. 121, 131, the unemployment compensation program was intended to be the " 'first line of defense for * * * [a worker] ordinarily steadily employed',"[7] and its purpose was "to enable workers 'to tide themselves

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[6] It should be noted that development of income from resources ordinarily results in a reduction of AFDC benefits. In the case of unemployment compensation, however, development of income results in termination of AFDC benefits for the period in which compensation or could be obtained. This treatment of unemployment compensation reflects the fact that Congress regards AFDC and unemployment compensation as mutually exclusive programs. See pp. 19–21, *infra.*

[7] Quoting the Hearings before the Senate Committee on Finance, on S. 1130, Report of the Committee on Economic Security, 74th Cong., 1st Sess. 1321.

over, until they get back to their old work or find other employment, without having to resort to relief' " (quoting H. Rep. No. 615, 74th Cong., 1st Sess. 7).[8]

In 1961, the AFDC program was extended for the first time to cover children of an unemployed parent (father or mother). Under the 1961 amendment, states participating in the AFDC program were authorized, but not required, to deny part of or all AFDC benefits "if the unemployed parent * * * re-

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[8] The pertinent part of this House Report states (*ibid.*):

"In normal times [unemployment compensation] will enable most workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief. * * * Unemployed workmen who cannot find other employment within reasonable periods will have to be cared for through work relief or other forms of assistance, but unemployment compensation will greatly reduce the necessity for such assistance. Unemployment compensation is greatly preferable to relief because it is given without any means test."

Like this House Report, the Senate Report also shows that the original design was that assistance programs based on need, such as AFDC, would be made only if unemployment compensation had been exhausted or was unavailable:

"Such unemployment compensation is not a complete safeguard against the hazard of unemployment. In periods of prolonged depression many workmen will exhaust their compensation benefits before they find other employment. This will hold true of some workmen even in periods of prosperity. Supplemental to unemployment compensation there will still be need for work relief for those whose compensation rights have been exhausted, as well as for workers who are outside of the compensation system.

"But unemployment compensation does have real value for many workers. In normal times most workers will secure other employment before exhaustion of their benefit rights. * * * For the great bulk of industrial workers unemployment compensation will mean security during the period following unemployment while they are seeking another job, or are wait-

ceives unemployment compensation." 75 Stat. 76. But whether a state provided for termination or only reduction of AFDC benefits when unemployment compensation was available, the obligation to develop income from resources, including unemployment compensation, remained in force.

In 1968, Congress made the optional provision mandatory by amending the Act to require that AFDC be denied if and so long as such child's "father * * * receives unemployment compensation under an unemployment compensation law of a State or of the United States." 81 Stat. 821, 883. Again, as in 1961, the requirement that income be developed from available resources remained intact.[9]

3. The legislative history of the 1968 amendment (the mandatory bar) demonstrates that Congress intended that an unemployed father would be required to exhaust the unemployment compensation resource, and upon the availability of such benefits, AFDC would be terminated. The Conference Report on the 1968 Act explained:

> * * * Section 407 of the Social Security Act, as amended by section 203(a) of the House bill defined an unemployed father (for purposes of determining the eligibility of his children for AFDC) so as to exclude fathers who do not

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ing for a return to their old position. In most cases the compensation they will receive will be all that they will need. While unemployment compensation will not do away entirely with the necessity for relief, it should very materially reduce the costs of relief in future years." S. Rep. No. 628, 74th Cong., 1st Sess. 11–12.

[9] Had Congress intended to alter this requirement, it would have amended Section 402(a)(7).

> have 6 or more quarters of work in any 13-calendar-quarter period ending within one year prior to the application for aid, and fathers who receive (*or are qualified to receive*) any unemployment compensation under State law.
>
> The Senate amendments removed these exclusions, and restored the provision of present law under which a State may at its option wholly or partly deny AFDC for any month where the father receives unemployment compensation during the month. * * *
>
> The Senate recedes * * *.

H. Rep. No. 1030, 90th Cong., 1st Sess. 57 (emphasis added).

In their motion to affirm (pp. 12–13), appellees argue that the Conference Committee used the phrase "qualified to receive" unemployment compensation in reference to the eligibility requirement of Section 407(b)(1)(C), not to the mandatory bar provision, Section 407(b)(2)(C)(ii). But the Conference Report cannot fairly be given appellees' interpretation because the report refers to the *exclusion* of "fathers who receive (or are qualified to receive) any unemployment compensation." The eligibility provision (Section 407(b)(1)(C)) expressly *includes* such fathers where receipt or qualification to receive occurred in the preceding year, but in the mandatory bar provision *excludes* during any current week in which unemployment compensation is received or when an unemployed father is eligible to receive it.

Any doubt as to the meaning of the Conference Report is removed by the Senate Committee on Finance, which summarized the major recommendations presented to the Committee in the House version

of the 1968 Act.[10] In summarizing testimony against Section 407(b)(2)(C)(ii), the report described this provision as "*not allowing payment if father is eligible for unemployment compensation.*" Committee Print, Brief summary of major recommendations presented in oral and written statements during public hearings before Senate Committee on Finance, on H.R. 12080, 90th Cong., 1st Sess. 32. Like the Conference Committee, the Senate Committee thus also viewed the provision as barring AFDC payments to persons qualified for unemployment benefits.

Finally, when Congress used the word "receives" in Section 407(b)(2)(C)(ii), it legislated in light of the Secretary's consistent view that an applicant for AFDC must first develop income from all other resources, including unemployment compensation if available (see pp. 17–18, *supra*). Accordingly, the Secretary's view is entitled to deference under the principle that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 381 (footnotes omitted); see *Lewis* v. *Martin,* 397 U.S. 552. Here, as discussed above, the Conference Report to the 1968 amendment shows that Congress not only refused to alter the Secretary's construction, but indeed endorsed it.

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[10] The initial House version of Section 407(b)(2)(C)(ii) was identical to the one Congress enacted.

4. The decision in the only other case[11] of which we are aware that has considered the question of the relationship between AFDC and unemployment compensation, is consistent with our position. In *Burr* v. *Smith,* 322 F. Supp. 980 (W.D. Wash.), affirmed, 404 U.S. 1027, AFDC applicants challenged the constitutionality of the Washington statute and welfare regulation implementing Section 407(b)(2)(C)(ii). The regulation provided: "An otherwise eligible child shall be ineligible for AFDC–E with respect to any week for which his father receives unemployment compensation." 322 F. Supp. at 983. The district court in *Burr* held that "[a] father cannot avoid disqualification simply by failing to register for and receive unemployment compensation." 322 F. Supp. at 984, n. 5. Although the federal statute was not in issue in *Burr,* the district court noted that the state regulation was required by federal law, and the court then concluded that, as thus construed, the exclusion provision was valid.

5. The district court erroneously construed the mandatory provision because, we submit, it did not recognize the significance of Section 402(a)(7)'s requirement that an AFDC applicant develop income from all available resources.[12] The decision below permits the circumvention of that requirement in order to insure that "families of unemployed fathers, like other fami-

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[11] The proper construction of Section 407(b)(2)(C)(ii) is presently at issue in *Salamone* v. *Mason,* Civil Action No. M–74–656 (D. Md., filed June 25, 1974). On November 4, the district court issued an order staying proceedings pending this Court's decision in this case.

[12] Unfortunately, the government did not call the district

lies applying for AFDC, should be assured of receiving an income equal to the state standard of need, irrespective of their eligibility to receive outside income" (J.S. App. 14A). This result is, however, simply not what Congress intended. Congress could, of course, have provided that unemployment compensation be treated as any other resource, *i.e.*, causing a reduction rather than a termination of AFDC; and had it wished to do so in 1968 it would have repealed the provision which permitted states to deny AFDC if unemployment compensation was available. Instead, it adopted the mandatory bar provision.

Moreover, the district court's decision does not merely place families with unemployed fathers on the same footing as other AFDC families. The circumvention of the obligation to exhaust unemployment compensation has important implications for the administration of the AFDC–UF program because it will have the anomalous result of shifting significant costs of assisting the unemployed from the unemployment compensation program to the AFDC program. Twenty-four states in addition to Vermont participate in the program for unemployed fathers. Since the amount the states pay as unemployment compensation frequently varies from family to family, it is impossible to estimate in what proportion of cases AFDC payments would exceed state unemployment insurance

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court's attention to Section 402(a)(7). The statutory construction issue arose at oral argument. The government's memorandum of March 27, 1973, asserted that the question whether Section 407(b)(2)(C)(ii) permitted an AFDC applicant to refuse unemployment compensation was not presented since all plaintiffs had in fact received such benefits.

benefits. The instances of such excess are likely to be substantial, however, and whenever there is such a difference, the decision below will probably lead to the shifting of a substantial number of claims which would otherwise be borne by the unemployment compensation program to the state and federally-funded AFDC program.[13] Commissioner Philbrook of the Vermont Department of Social Welfare estimates that for fiscal year 1975, the additional AFDC costs to Vermont under the district court's decree could be $1 million (App. 101–102). The additional federal share in Vermont would then be approximately $2 million.

As we have shown above, Congress viewed unemployment insurance as the primary source through which unemployed parents would receive financial assistance, and intended AFDC to be available only when unemployment insurance was unavailable. The effect of the decision below would be to permit the federally-assisted AFDC program to be used to subsidize unemployed parents for what they consider inadequacies in a state compensation program. That is not what Congress intended when it barred AFDC benefits to persons who "receive" unemployment compensation.

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[13] The AFDC program is funded by appropriations from general federal and state revenues. 42 U.S.C. 620; 33 V.S.A. 2554, 2703. Vermont's general assistance program is also funded by general state revenues. 33 V.S.A. 3003. In contrast, unemployment compensation in Vermont and other states is paid from a separate fund, which consists of funds collected from private employers, 21 V.S.A. 1324–1327, 1358–1359, and money credited to the State's account in the federal Unemployment Trust Fund, 42 U.S.C. 501–504, 1101–1108, which is also funded by a tax on employers, 26 U.S.C. 3301–3311. *California Human Resources Dept.* v. *Java*, *supra*, 402 U.S. at 126.

Indeed, the district court's decision would shift more of the costs to the AFDC program than the plan which Congress tried but then twice rejected. As noted above, between 1961 and 1968, states were granted the option to deny part or all AFDC benefits "if the unemployed parent * * * receives unemployment compensation." 75 Stat. 76. If this provision were in effect today and a state chose not to bar AFDC benefits completely, Section 402(a)(7), as construed by the Secretary, would nonetheless require that a family's AFDC benefits be reduced by the amount of unemployment compensation actually received or potentially available. Under such a system, then, in contrast to the district court's result, the unemployment compensation program would bear at least part of the cost of assisting the family.

In 1967 and 1968, the Senate passed bills which would have retained this optional system, but on both occasions, the House insisted upon the present mandatory bar embodied in Section 407(b)(2)(C)(ii). H. Rep. No. 1030, 90th Cong., 1st Sess. 57; H. Rep. No. 1533, 90th Cong., 2d Sess. 49. After Congress has twice rejected a proposal which would have permitted the extension of AFDC to families without reducing the costs to be borne by unemployment compensation, it is indeed anomalous that the district court would construe Section 407(b)(2)(C)(ii) to permit a father to choose to forego unemployment compensation altogether in order to receive AFDC benefits. That holding enables the unemployment compensation program to be relieved entirely of the burden of assisting the family while the entire burden will be shifted to the AFDC program.

Admittedly, the mandatory bar provision may produce harsh results where there is a significant disparity in benefits between AFDC and unemployment compensation.[14] Congress, however, concerned with increasing costs of the AFDC program, deliberately adopted the mandatory bar in 1968. The provision accomplishes its primary purposes of reducing the financial burdens of the AFDC program. In addition, although not articulated in the legislative history, the provision may also serve to induce states to upgrade their unemployment compensation programs, or to develop or upgrade general assistance programs.

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[14] This harshness is mitigated to some extent by the fact that the termination of AFDC lasts only as long as unemployment compensation is available. In some cases the disparity in benefits will be reduced by state general assistance program benefits. Such a program exists in Vermont although the record is unclear as to its benefit levels.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case should be remanded for consideration of the constitutional issues.[15]

Respectfully submitted.

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[15] Although this Court has on occasion considered issues not decided by the court below (*e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 476, n. 6), we submit that it would be inappropriate to do so here. Appellees' constitutional claims were not reached by the district court, and while these claims were argued below, in our view the claims should be considered by the district court in light of a proper construction of the statute.

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v.

JEAN GLODGETT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

REPLY BRIEF FOR THE APPELLANT

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1. Appellees contend (Brief, p. 38) that "[t]he plain meaning of Section 607(b)(2)(C)(ii) is that Congress was concerned that a family could receive concurrent payments of unemployment compensation and AFDC-UF." To the extent this contention suggests that Congress was concerned with double payments, it finds no support in either the legislative history of the statute or in the history of the operation of the AFDC program.

In 1961, when AFDC was first extended to children of unemployed parents, states were given the option to deny in whole or part AFDC benefits to which a child was otherwise entitled if a parent received unemployment compensation. Where a state elected not to deny AFDC if unemployment compensation was received, the result was that unemployment compensation was treated like any other resource, *i.e.*, it was considered in establishing need. See

Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Pt. IV, §3424.26 (1963); S. Rep. No. 165, 87th Cong., 1st Sess., p. 2. Thus, the risk of concurrent or double payments never existed.

To the extent appellees suggest that Congress intended to preclude concurrent (but not double) payments, their contention is correct, but it does not support their claim to relief. In 1968, when Congress replaced the optional provision with the mandatory bar, it sought to reestablish the traditional reliance on unemployment compensation as the primary source of assistance for the unemployed, and to insure that AFDC was available only as a program of last resort.

There is no dispute that at a minimum, in enacting the 1968 amendments, Congress intended that AFDC benefits be terminated if a father received unemployment compensation. Thus, the only question of statutory construction is whether Congress intended to give fathers an option to decline unemployment compensation. As shown in our main brief, the district court's conclusion that such an option existed is contrary to the structure of the Act, its legislative history, and consistent administrative construction.

We add only that the district court decision renders the mandatory bar provision a nullity and, in practical effect, assumes that Congress intended to discourage unemployed fathers from receiving unemployment compensation. That assumption is incorrect. In 1968 Congress was concerned with the escalating costs of the welfare program. It is inconceivable that Congress intended to exacerbate that problem by permitting the shifting of significant costs of assisting the unemployed from unemployment compensation programs to AFDC.

2. Appellees correctly point out that as the prevailing party below they are entitled to rely on any ground supported by the record in seeking affirmance of the district court judgment (Brief, p. 62). Appellees urge that if this Court concludes that the district court's construction of Section 607 is erroneous, it should then consider their constitutional claim. Although we have suggested that the case should be remanded for consideration of the constitutional issue, we are responding to appellees' arguments should this Court reach the question.

Appellees contend that the mandatory bar provision impermissibly discriminates against a class of children solely on the basis of the source of their father's income. Appellees' claim is one of underinclusiveness—that is, they argue that the mandatory bar provision constitutes invidious discrimination because children whose fathers receive unemployment compensation have their AFDC benefits terminated without regard to their "need" status.

Appellees recognize that the mandatory bar provision must be analyzed under the "rational basis" test which this Court has traditionally applied to review of welfare legislation. Under that test a statute must be upheld if the goals are legitimate and the legislative classification is rationally related to the accomplishment of the congressional purpose. See *Jefferson* v. *Hackney*, 406 U.S. 535; *Richardson* v. *Belcher*, 404 U.S. 78, 81; *Dandridge* v. *Williams*, 397 U.S. 471.

Implicit in appellees' constitutional claim are the premises that either it is in fact the goal of the AFDC program to provide benefits to all persons on the basis of need, or, alternatively, that Congress is constitutionally obligated to operate the program in that fashion. Neither premise is correct.

AFDC has never been and is not now a comprehensive public assistance program. From its inception in 1935 until 1961 AFDC was not available to families with unemployed fathers. Although the program was so extended in 1961, state participation was not made mandatory, and at the present time only 25 states have AFDC-UF programs. Moreover, AFDC has never been available to families with an employed father even though a family's income level may fall below the need standard applicable to AFDC programs. See 42 U.S.C. 606(a) and 607(b); see also *Henry* v. *Betit*, 323 F. Supp. 418 (D. Alaska).

Although the goal of the AFDC program is to assist families who are in need, confronted with a finite amount of funds available for this purpose, Congress has chosen to allocate public assistance to those classes of families who are least able to change their circumstances. Historically, Congress has relied on minimum wage laws and collective bargaining, rather than AFDC, to assist the employed (*Macias* v. *Finch*, 324 F. Supp. 1252 (N.D. Cal.), affirmed *sub nom. Macias* v. *Richardson*, 400 U.S. 913), and on unemployment compensation as the primary means of assisting families with an unemployed father. See our main brief, pp. 19-20. Although that distinction was blurred in 1961 when AFDC was extended to families with unemployed fathers, it was essentially reestablished in 1968 with the enactment of the mandatory bar provision.

If equal protection principles require the extension of AFDC benefits to families where the father receives unemployment compensation, it is difficult to see why logically they do not also require the extension of AFDC to families where the father is employed—in short, they would require the development of a comprehensive public assistance program. See *Geduldig* v. *Aiello*, 417 U.S. 484, 495. But we submit that adoption of a comprehensive public assistance program is not consti-

tutionally required. The desirability of such a course of action is a matter for legislative determination and requires a resolution of conflicting interests and policies as to which there has historically been no consensus. See generally Moynihan, *The Politics of a Guaranteed Income* (1973).

Given the congressional goal of providing public assistance within a framework of limited funds, the exclusion of families where an unemployed father receives unemployment compensation has a rational basis.It is consistent with the historical reliance on unemployment compensation as the first line of defense for the unemployed, and, as recognized in *Burr* v. *Smith*, 322 F. Supp. 980, 985 (W.D. Wash.), affirmed, 404 U.S. 1027, unemployment compensation benefits promote attachment to the labor force, and such benefits "* * * which [are] temporary in nature, may act as a greater incentive for the unemployed to seek new employment than the receipt of welfare assistance." In many cases unemployment compensation benefits will approximate or exceed AFDC benefit levels and where unemployment compensation is inadequate it may be supplemented by other state assistance programs.[1] Finally, as pointed out in our main brief, states may upgrade their unemployment compensation and assistance programs.[2] Moreover, the exclusion is only temporary because of the limited duration of unemployment compensation benefits.[3] Upon the expiration

[1]Vermont has such an assistance program. As noted in our main brief, however, the level of benefits available is not shown in this record.

[2]As appellees' brief points out (App. B, p. 1b), since 1972 14 of the 25 states that have both unemployment compensation and AFDC-UF programs have upgraded their unemployment compensation programs. See also *Burr* v. *Smith, supra*, 322 F. Supp. at 982, n. 1.

[3]Under Vermont law, unemployment benefits are payable for a maximum of 26 weeks unless, in certain circumstances, they are extended for 39 weeks. See 21 V.S.A. 1340, 1421. In addition, under the Emergency Unemployment Act of 1974, Pub. L. 93-572, 88 Stat. 1869, under certain conditions, an additional 13 weeks (for a maximum of 52) of benefits, payable from federal funds, is available.

of such benefits, if the father remains unemployed, AFDC benefits are restored, assuming other eligibility conditions are satisfied.

We do not contend that the mandatory bar is the wisest or most socially desirable policy that could be devised, but we do submit that its rejection, on constitutional grounds, would entail a consideration of factors that this Court has repeatedly held inappropriate for judicial resolution. See, *e.g.*, *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 541; *Dandridge* v. *Williams*, *supra*, 397 U.S. at 487; see also Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1082-1087, 1192 (1969).

For the foregoing reasons, and for the reasons set forth in our main brief, the judgment of the district court should be reversed.

Respectfully submitted.

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